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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MM Docket No. 92-259
Protection Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

TO: The Commission

REPLY COMMENTS OF NETLINK USA

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January 19, 1992

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REPLY COMMENTS OF NETLINK USA

Netlink USA ("Netlink") hereby submits its reply to comments filed in the above-captioned proceeding by the National Association of Broadcasters ("NAB"). Specifically, Netlink submits that, with regard to satellite carriers, the draft rules submitted by NAB to implement the retransmission consent provisions of the Cable Television Consumer Protection Act of 1992 ("Cable Act of 1992"), NAB Comments, App. A, are in conflict both with the intent of Congress and with existing law.

Netlink is a "satellite carrier" as that term is defined in the Satellite Home Viewer Copyright Act of 1988 ("SHVA"), 17 U.S.C. § 119(d)(6). It retransmits the signals of five broadcast television stations licensed to Denver, Colorado,[1]

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[1] Those stations are the three network affiliates, KCNC-TV (NBC), KMGH-TV (CBS), and KUSA-TV (ABC), as well as an independent or superstation, KWGN-TV, and an educational station, KRMA-TV.

to the Home Satellite Dish ("HSD") market. In accordance with SHVA, Netlink's provision of network service is limited to "unserved households." 17 U.S.C. § 119(a)(2). That term is defined as a household that

> (A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and
>
> (B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

[17 U.S.C. § 119(d)(10) (emphasis added).]

SHVA provides a full mechanism whereby the "unserved household" restriction is implemented. Initially, satellite carriers were directed to provide each network with a list of all subscribers who received by satellite the signal of an affiliate of that network. 17 U.S.C. § 119(a)(2)(c). Thereafter, each month, the carriers must provide a list of all such subscribers added or dropped. Id. The purpose of the provision of such information is to permit the networks to monitor compliance with the unserved household restriction.

At the outset, all subscribers are "pre-screened" at the time they subscribe in an effort to ensure compliance. The lists of new subscribers (and dropped subscribers) are then sent to each network. Generally, the networks break those monthly lists down by location and send them to their affiliates, who

check to see if new subscribers meet the definition. If it appears that a new subscriber might not be an unserved household, the networks return the name. Netlink then takes steps to verify that the subscriber cannot receive a signal of Grade B intensity. If verification fails, service of that particular network to that subscriber is cut off. For violation of the unserved household restriction, the carriers are subjected to infringement actions under the Copyright Act, 17 U.S.C. § 501, and to the full array of statutory remedies of that Act. 17 U.S.C. § 119(a)(5).

In adopting a retransmission consent provision, Section 6 of the Cable Act of 1992, Congress did not intend to alter the relationship between satellite carriers and networks set forth in SHVA. Indeed, Congress was careful to carve out several exceptions to retransmission consent, including those specifically tailored to satellite carriers under SHVA, stating that consent would not be required for:

> (A) retransmission of the signal of a noncommercial broadcasting station;
>
> (B) retransmission directly to a home satellite antenna of the signal of a broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network, if such signal was retransmitted by a satellite carrier on May 1, 1991;
>
> (C) retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household.

[47 U.S.C. § 325(b)(2).] Furthermore, for purposes of retransmission consent, Congress incorporated into § 325 of the

Communications Act the SHVA definitions of "satellite carrier," "superstation," and "unserved household." Id.

In its Comments, NAB suggests, without citation, that Congress "appears to have intended to create a communications law-based remedy for retransmissions of the signals of network affiliates to home dishes that would be impermissible under the copyright laws." NAB Comments 41. Netlink submits that Congress had no such intent and that the rules suggested by NAB are inconsistent with SHVA.

In proposing Section 6 of the Cable Act of 1992, the Conference Committee was silent on the exceptions. See H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 75-77 (1992). Moreover, the House version of the bill had contained no provision whatsoever on retransmission consent. Id. at 76. However, the original Senate bill, S.12, did contain a retransmission consent provision in its Section 15. The sole exception the Senate provided was a broad one, covering all service by a satellite carrier of signals that were carried on May 1, 1991, and lasting until December 31, 1994, the date on which the license provided for in SHVA currently is scheduled to expire. The Senate Committee on Commerce, Science, and Transportation, in reporting out S.12, explained that the purpose of that exception was to "avoid any disruption of the settled arrangements" for satellite carriage under SHVA. S.Rep. No. 102-92, 102d Cong., 1st Sess. 37 (1991). No mention is made of the exceptions being intended to create a "new remedy."

Netlink submits that the only reasonable inference to be drawn from the legislative history is that Congress did not intend to create a "new remedy." The existing copyright law remedy has not been found to be inadequate and Congress expressly stated it did not wish to disrupt existing relationships. Accordingly, there is no need for the Commission to undertake the role of enforcing the Copyright Act, as NAB suggests.

Furthermore, if it were appropriate for the Commission to adopt such a role, any rules adopted would need to comport precisely with SHVA. In fact, there is a major inconsistency between SHVA and the rules suggested by NAB. The proposed rules would permit a petition to be brought by "a station owned by, or affiliated with a network within whose Grade B contour the signal of another station owned by or affiliated with the same network is being retransmitted..." NAB Comments, App. A at 3 (emphasis added). Thus a network affiliate could file a petition whenever an HSD network subscriber was located within its Grade B contour. However, SHVA does not restrict all service within such Grade B contours. Rather, as quoted and emphasized on page 2 above, SHVA proscribes network service to a subscriber who cannot receive an over-the-air signal of Grade B intensity, whether or not that person resides within the predicted Grade B contour of an affiliate. Such a subscriber may well be within the predicted Grade B contour but might receive an actual signal of less than Grade B strength for any number of reasons, such as terrain shielding or obstruction by buildings. Broadcasters themselves often use translators to fill in "holes" within their Grade B

contours. If the NAB's suggested rule were adopted it would, therefore, import a different standard from SHVA and, contrary to the directive of Congress, disrupt certain relationships under SHVA.

In conclusion, contrary to NAB's assertion, the exceptions for satellite carriers to the new retransmission consent provisions are nothing more than that -- exceptions. They were not intended to form the basis of a new remedy for the networks and their affiliates, whose rights are already fully protected by SHVA. Finally, even if Congress did intend to create a new remedy, the rule suggested by NAB cannot be adopted because it does not square with SHVA.

Respectfully submitted,

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